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IN THE

Supreme Court of the United States

October Term, 1975

THE FIRST BOSTON CORPORATION,
Petitioner,

v.

CHRIS-CRAFT INDUSTRIES, INC., *et al.*,
Respondents.

FIRST BOSTON'S REPLY BRIEF

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Chris-Craft's Brief in Opposition employs emotive language and factual distortion to obscure the straightforward and important legal issues raised by this case and presented by First Boston's Petition. These issues go to the heart of enforcement of the federal securities laws as a coherent whole and demand resolution by the Court.

"Fraud"

Chris-Craft seeks to avoid the basic issue as far as First Boston is concerned: Can Chris-Craft create an action under Section 14(e) of the 1934 Act out of Section 11 of the 1933 Act and thereby be relieved from Section 11's express limitations on an underwriter's liability? In pursuit of this goal, Chris-Craft chants "fraud" and "fraudulent" for page after page as if it were thereby invoking a magic talisman that would convert a failure to discharge the duty of due diligence under Section 11 into an action under Section 14(e).

The court below, however, did not find that First Boston had committed "fraud" on Chris-Craft or anyone

else. Indeed, the Court of Appeals left undisturbed the trial court's finding that First Boston had "acted solely" in "good faith" (A158-59; *see also* A55 n. 25).

Chris-Craft's recovery from First Boston was based *solely* on the ground that First Boston failed to discharge its special statutory duty as a 1933 Act underwriter (A48-51). Section 14(e) of the 1934 Act was used as a basis for affording Chris-Craft *standing* to sue First Boston (A49, A55), but the basis of liability was the standard of care prescribed for an underwriter by Section 11 of the 1933 Act (A48-51, B10).[1]

Chris-Craft's whole argument against First Boston thus comes down to the proposition that a failure fully to perform the special statutory duty of due diligence of a 1933 Act underwriter is equivalent to "fraud," so that by such characterization a plaintiff without a claim under the 1933 Act can recover under the 1934 Act without proving anything more, and with all the 1933 Act limitations on an underwriter's liability swept away. (*Compare* Brief at 4, 31-34 *with* A48-55, B10.) Chris-Craft's dependence on such an equation and characterization to justify the decision below emphasizes the importance of this case and the need for its review on certiorari.

Standing and Damages

Chris-Craft describes as "sham" (Brief at 19) the question of its standing to sue under Section 14(e) of the

[1] Chris-Craft's claim that "the violations stand admitted" (Brief at 14) is untrue, but, were it true, it would not dispose of the questions raised by the Petition. The similar claim that Chris-Craft "concededly" would have been the leader in the contest for control but for the alleged violations of defendants is also untrue (see pages 4-6, *infra*), as are all its other claims of admission or concession.

1934 Act.[2] The questions Chris-Craft thereby seeks to dismiss are far from "sham."

The court below has granted Chris-Craft recovery under the 1934 Act against First Boston *as a 1933 Act underwriter*, despite the fact that the 1933 Act confines underwriters' liability to purchasers of the registered security. Moreover, it has awarded Chris-Craft damages four times the maximum permitted by the 1933 Act.

The extraordinary anomaly of affording greater recovery to a plaintiff not within the group Congress sought to protect by the 1933 Act than would be available to the express beneficiaries of the Act is nowhere addressed in Chris-Craft's brief.[3]

The issues thus raised are both important and unresolved. Indeed, in contrast to Chris-Craft's assertion (Brief at 4) that it is "settled law," the Court in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), has expressly held open the question whether an implied action under the 1934 Act "will lie for actions made a vio-

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[2] The legislative history of the Williams Act, including the very portion cited by Chris-Craft (Brief at 20), shows that Congress in enacting Section 14(e) was not seeking to protect contestants for control, but was instead concerned with "protection of investors" and affording "shareholders a fair opportunity to make their decision." H. R. REP. No. 1711, 90th Cong., 2d Sess. 4 (1968).

[3] Far from seeking "to make bankers a privileged class" (Brief at 33), we urge only that the *special* duties and liabilities imposed upon bankers by Congress should not be expanded beyond the bounds fixed by Congress itself.

lation of the 1933 Act and the subject of express civil remedies under the 1933 Act." 95 S.Ct. 1917, 1933 n.15.[4]

Causation

Chris-Craft's theory of "causation" is fully stated at page 24 of its brief. It is but a variant of the *post hoc, ergo propter hoc* fallacy: a causal relationship between the alleged violations and Chris-Craft's loss of the contest for control is deemed shown merely from the fact that the violations occurred and the fact that Chris-Craft lost the contest.

Neither the evidence nor logic affords any basis whatever for concluding that the omission of the BAR sale possibility affected the success of the Bangor Punta exchange offer in any way. In fact, all indications are to the contrary—the record shows the market went up when the sale of the BAR was later agreed upon and announced (591a), and no tendering shareholder has ever sued Bangor Punta or First Boston claiming that he was misled to his detriment by the omission.

Unlike Chris-Craft in its presentation to this Court, the court below did not suggest that causation *in fact* was established by the record. Instead it relied upon a *legal*

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[4] *Fischman* v. *Raytheon Manufacturing Co.*, 188 F.2d 783 (2d Cir. 1951), and the other lower court decisions cited at pages 32-33 of Chris-Craft's brief have permitted such actions only to the limited extent of allowing a *purchaser or seller* of securities of the same issuer to recover under the 1934 Act from those responsible for a 1933 Act registration statement *if they can prove fraud.* This is a far cry from holding that a *non-purchaser* such as Chris-Craft may recover under the 1934 Act for a failure to discharge a special duty created by the 1933 Act. And even *Fischman's* limited exception has not been approved by this Court.

presumption of causation said, incorrectly, to have been established by *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375.

Seeking to cloud the decisional and precedential significance of the Court of Appeals' elimination of causation as a factual issue, Chris-Craft's argument transgresses the bounds of advocacy and affirmatively misrepresents to the Court the state of the record and the decision below:

At page 10 of its brief, Chris-Craft states:

> "No one defends the BAR fraud in this Court. The impact of this fraud, established by the trial record, was dramatic. Chris-Craft's exchange offer attracted slightly more Piper shares than had Bangor's fraudulent offer (A18). Thus, if disclosed, the $13,400,000 BAR loss would have been critical. The Second Circuit declared:
>
> > '. . . BPC's offer was not so appealing, considering the BAR loss, as to have attracted any takers. . . . [I]t is clear that the 7% acquired through its exchange offer was critical to its success.' (A60)"

This curtailed quotation can only be taken to mean that the record proved as a *fact*, and the Court of Appeals found as a *fact*, that Bangor Punta's exchange offer would have failed had mention of the BAR sale possibility been made.

The record contains *no* such proof and the Court of Appeals made no such *factual* finding. The Court of Ap-

peals said something much different, as language omitted from Chris-Craft's brief shows (A60; emphasis added):

> "In applying the *Mills-Ute* test to the instant action, we *presume* that the Piper shareholders would not have accepted the BPC exchange offer but for the misrepresentations to which we have referred above. Even if we assume arguendo that BPC's offer was superior to that of CCI, taking into account the BAR loss, we still *must conclude* that BPC's success was unlawfully attained. Piper shareholders had a third option, i.e. to hold their shares, which *presumably* they would have chosen if all the material facts had been disclosed. *Under the Mills-Ute test, we must presume that* BPC's offer was not so appealing, considering the BAR loss, as to have attracted any takers. See *Vine* v. *Beneficial Finance Co., supra,* 374 F.2d at 635. Since BPC eventually acquired only about 51% of the outstanding Piper shares, it is clear that the 7% acquired through its exchange offer was critical to its success. Reliance and causation have been shown."

This wholly unjustified *presumption* of causation (a presumption in favor of a non-purchaser who in no sense relied on the registration statement) rests upon a grave misconstruction of *Mills,* and, in contravention of the most basic legal norms, affords recovery where there is no injury. It cannot be allowed to stand as a rule of decision.

Conclusion

For the reasons stated in the Petition and herein, a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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